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In the Supreme Court of the United States

OCTOBER TERM, 1979

INDEPENDENT BANKERS ASSOCIATION OF AMERICA,
PETITIONER

v.

JOHN G. HEIMANN, COMPTROLLER OF THE CURRENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 613 F. 2d 1164. The orders of the district court (Pet. App. 14a-19a) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on December 28, 1979. A petition for rehearing was denied on February 1, 1980 (Pet. App. 13a). The petition for a writ of certiorari was filed on April 28, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Financial Institutions Supervisory Act of 1966, 12 U.S.C. 1818(b) and (n), authorizes the Comptroller of the Currency to adopt a regulation forbidding employees, officers, directors or principal shareholders of a national bank from retaining commissions or other income from the sale of credit life insurance in connection with a loan made by the bank.

2. Whether the Comptroller's regulation constitutes an improper attempt to regulate the business of insurance, in violation of the McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq.*

3. Whether the Comptroller's regulation permits national banks to provide general insurance services that exceed the authority granted under the National Bank Act, ch. 461, 39 Stat. 752, 12 U.S.C. 21 *et seq.*

STATUTES AND REGULATIONS INVOLVED

The relevant statutory and regulatory provisions are set forth at Pet. App. 20a-22a and 25a-30a.

STATEMENT

1. This case concerns the validity of a regulation promulgated by the Comptroller of the Currency to prevent insiders of national banks from personally profiting from the sale of credit life, health and accident insurance ("credit life insurance"). Credit life insurance protects a creditor bank against losses resulting from the death or disability of its borrowers. Such insurance is now widely provided by banks to secure consumer loans (Pet. App. 5a-6a).

The Comptroller initiated rulemaking proceedings under the Financial Institutions Supervisory Act of 1966, 12 U.S.C. 1818. That Act authorizes the Comptroller to

issue cease and desist orders against national banks engaged in any "unsafe or unsound" banking practice. 12 U.S.C. 1818(b). It also authorizes the Comptroller to issue cease and desist orders to prevent violations of any "rule or regulation" applicable to national banks. *Ibid.* In addition, the Comptroller is expressly empowered "to make rules and regulations" that apply to proceedings brought to restrain unsafe or unsound banking practices. 12 U.S.C. 1818(n).

The Comptroller published the text of his proposed regulation for public comment in July 1976. See 41 Fed. Reg. 29846 (1976). The proposed regulation declared that retention of credit life income by employees, officers, directors and principal shareholders of a national bank is an "unsafe and unsound banking practice" within the meaning of Section 1818(b).[1] Thereafter, more than 200 comments were received from various persons, including the Federal Trade Commission, national banks, trade associations, and consumer groups. In September 1977, the Comptroller published the final text of his regulation, to become effective in January 1978. See 12 C.F.R. 2. At that time, the Comptroller explained that retention of credit life income by bank insiders is a form of self-dealing and that similar conduct has caused many bank failures in recent years. The Comptroller pointed out that a loan officer's judgment on the quality of a loan can be

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[1]The Comptroller explained (Pet. App. 25a) that the purpose of the regulation is to "prohibit employees, officers, directors and principal shareholders of national banks from benefitting personally on the sale of credit life insurance to loan customers" and to "encourage marketing of credit life insurance through the use of bank facilities only under arrangements which assure that employees, officers, directors and principal shareholders do not receive benefits not shared with all stockholders of the bank."

influenced adversely by the possibility of receiving direct financial rewards for making the loan and selling the borrower credit life insurance. See 42 Fed. Reg. 48518, 48524 (1977).

2. In December 1977, petitioner Independent Bankers Association of America brought this action in the United States District Court for the District of Columbia to enjoin the Comptroller from enforcing his regulation. The district court dismissed the complaint, holding that the issues presented were not ripe for adjudication. The court concluded that the regulation was merely a statement of opinion rather than an enforceable legal standard (Pet. App. 16a). The Comptroller thereafter sought a modification of the court's opinion, explaining that his regulation is a substantive rule with the force of law. The district court subsequently modified its opinion (*id.* at 18a), but reaffirmed that it was unnecessary to "decide the validity of the Regulation." The court "left that issue for decision in a cease and desist proceeding" (*id.* at 19a).

The court of appeals affirmed the district court's order dismissing the complaint (Pet. App. 1a-12a). However, the court upheld the Comptroller's regulation on the merits. The court found that the complaint was ripe for adjudication and that petitioner had standing to bring this action. The court held that the Comptroller had authority to issue the challenged regulation and that the regulation was consistent with both the National Bank Act, ch. 461, 39 Stat. 752, 12 U.S.C. 21 *et seq.*, and the McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq.*

ARGUMENT

This is the first case involving the validity of a regulation issued by one of the federal bank regulatory agencies that specifies that a particular banking practice is

"unsafe or unsound" under the Financial Institutions Supervisory Act of 1966.[2] Accordingly, there are no decisions that conflict with the decision of the court below. In addition, the decision has little continuing importance because Congress has recently enacted a statute that broadens the rulemaking authority of the Comptroller and removes any doubt that he may adopt substantive rules defining "unsafe and unsound" banking practices. Review by this Court of the decision of the court of appeals is therefore unwarranted.

1. *a.* Petitioner contends (Pet. 8-14) that the Financial Institutions Supervisory Act authorizes the Comptroller to adopt only procedural rules, not substantive regulations. However, 12 U.S.C. 1818(b) empowers the Comptroller to issue cease and desist orders to prevent national banks from engaging in any "unsafe or unsound practice" in the conduct of its banking business and also authorizes the Comptroller to restrain the violation of any "rule or regulation" applicable to national banks. In addition, 18 U.S.C. 1818(n) authorizes the Comptroller to "make rules and regulations" with respect to cease and desist proceedings involving unsafe or unsound banking practices. The Financial Institutions Supervisory Act thus provides a sufficient basis for the Comptroller's rule. The rule defines the statutory term "unsafe or unsound practice" and provides specific standards in cease and desist proceedings brought by the Comptroller. It also notifies national bank employees that particular behavior is deemed by the Comptroller to be improper and thus

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[2]Under that Act, the Comptroller, the Federal Deposit Insurance Corporation, the Federal Reserve Board, and the Federal Home Loan Bank Board may proceed administratively against "unsafe or unsound" banking practices within their respective jurisdictions. See 12 U.S.C. 1818(b), (n); 12 U.S.C. 1464(d)(2)(A).

promotes statutory compliance without the need for formal cease and desist proceedings. As the court of appeals explained (Pet. App. 7a):

> [A] regulation giving advance notice of conduct which the Comptroller disapproves as threatening to the safety and soundness of the banks he regulates is wholly consistent with the statutory scheme. The Comptroller was given authority to promulgate regulations in order to facilitate execution of his statutory powers. *See* 12 U.S.C. §1818(n). It would undermine the regulatory purpose of Congress to assume that the Comptroller must proceed solely by separate "cease and desist" cases. His ability to forewarn by specifying and clarifying the nature and scope of his concerns will at the same time minimize the necessity for recurrent and costly investigation into the conduct of the many individual banks under his supervision.

As the court of appeals also pointed out (Pet. App. 8a), the statutory language here involved is quite similar to that previously found to be a sufficient predicate for the adoption of substantive rules. See, *e.g.*, *National Petroleum Refiners Ass'n* v. *FTC*, 482 F. 2d 672 (D.C. Cir.), cert. denied, 415 U.S. 951 (1974). Both the Financial Institutions Supervisory Act, 12 U.S.C. 1818(b), (n), and the Federal Trade Commission Act, 15 U.S.C. 45(a), authorize the administrative agency to take action to redress broadly defined commercial problems (*i.e.*, "unsafe or unsound practices" in banking, and "unfair or deceptive acts or practices" in commerce), and to promulgate regulations in aid thereof (see Pet. App. 8a & n.14).

Although the decision below is the first decision dealing explicitly with the Comptroller's rulemaking authority in this area, the Fifth Circuit previously has held that the Comptroller possesses authority to adopt substantive standards relating to the disposition of funds obtained from the sale of credit life insurance. See *First National Bank of LaMarque* v. *Smith*, 610 F. 2d 1258 (5th Cir. 1980), upholding the Comptroller's authority to issue directives to national banks requiring them to cease allowing insiders to benefit personally from the sale of credit life insurance. In sustaining the Comptroller's broad authority in this area, the court explained (610 F. 2d at 1263-1264):

> Appellants assert the Comptroller has no authority to issue a substantive directive regarding the handling of credit life insurance by a national bank. We disagree. The Comptroller has not acted arbitrarily or capriciously, or abused his discretion in this case. See 5 U.S.C. § 706(2) (1976). The letter directives sent to the appellant banks constitute a lawful exercise of the Comptroller's authority to prevent national banks from engaging in unsafe and unsound banking practices under 12 U.S.C. §1818(b) (1976).

See also *Groos National Bank* v. *Comptroller of the Currency*, 573 F. 2d 889, 897 (5th Cir. 1978):

> The phrase "unsafe or unsound banking practice" is widely used in the regulatory statutes and in case law, and one of the purposes of the banking acts is clearly to commit the progressive definition and eradication of such practices to the expertise of the appropriate regulatory agencies.

Accord, *First National Bank of Eden* v. *Department of the Treasury*, 568 F. 2d 610, 611 & n.2 (8th Cir. 1978)

The decision of the court of appeals, upholding the Comptroller's authority to define "unsafe or unsound banking practices," is also consistent with this Court's recognition that the bank regulatory agencies have broad authority to preserve the soundness of the nation's financial institutions (*Board of Governors of the Federal Reserve System* v. *First Lincolnwood Corp.*, 439 U.S. 234 (1978)) and that considerable deference is owing to interpretations by the bank regulatory agencies of their own enabling statutes. See *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973); *Board of Governors of the Federal Reserve System* v. *Agnew*, 329 U.S. 441, 450 (1947) (Rutledge and Frankfurter, JJ., concurring); see also *Ford Motor Credit Co.* v. *Milhollin*, No. 78-1487 (Feb. 20, 1980), slip op. 10.

b. In any event, the question whether the court of appeals correctly construed the Comptroller's rulemaking authority under the Financial Institutions Supervisory Act of 1966 has little continuing importance. On March 31, 1980, the President signed into law the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132. Section 708 of that Act strengthens the Comptroller's rulemaking authority by adding a new statutory provision (to be codified at 12 U.S.C. 93a) that states:

> Except to the extent that authority to issue such rules and regulations has been expressly and exclusively granted to another regulatory agency, the Comptroller of the Currency is authorized to prescribe rules and regulations to carry out the responsibilities of the office, except that the authority

> conferred by this section does not apply to section 5155 of the Revised Statutes or to securities activities of National Banks under the Act commonly known as the 'Glass-Steagall Act.'[3]

Thus, even if petitioner were correct in its contention that the Financial Institutions Supervisory Act of 1966 does not confer substantive rulemaking authority on the Comptroller, the new enactment fills any statutory void.

2. Petitioner also argues (Pet. 14-17) that the Comptroller's regulation violates the McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq.* The court of appeals correctly rejected that contention, explaining that (Pet. App. 10a-11a):

> While it is true that the [McCarran-Ferguson] Act preserves to the states authority to regulate the relationship between the insurance company and its policyholder * * * a rule affecting the disposition of credit life insurance income received by national bank insiders does not fall within the strictures of the statute. Nothing in the McCarran-Ferguson Act was intended to affect the power of the Comptroller under authority of Congress to regulate "unsafe and unsound" banking practices of national banks. This exercise of power over income dispensed internally among national bank personnel lies well beyond the core of protection furnished to state insurance laws under the Act.

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[3]As the court of appeals noted (Pet. App. 8a n.15), the legislative history of this provision shows that it was meant to clarify the Comptroller's existing rulemaking authority rather than create new authority. See H.R. Rep. No. 1383, 95th Cong., 2d Sess. 29 (1978).

Moreover, because the Comptroller's regulation does not require banks to sell credit life insurance at all and various alternative methods for its sale are available in every state, there is no basis for petitioner's contention that the regulation would compel national banks to violate state insurance laws. See Pet. App. 10a & n.21; *First National Bank of LaMarque* v. *Smith*, *supra*, 610 F. 2d at 1263; see also the statement of basis and purpose accompanying the Comptroller's regulation (42 Fed. Reg. 48519-48520 (1977)).

3. Petitioner finally argues (Pet. 17-19) that Section 92 of the National Bank Act, ch. 461, 39 Stat. 753, bars the Comptroller from adopting the regulation here involved because the regulation permits national banks to act as agents for the sale of credit insurance (within specified limitations) in cities with more than 5,000 inhabitants.[4] That contention is fully answered in the opinion of the court of appeals and the statement of basis and purpose accompanying the Comptroller's regulation. As the court explained (Pet. App. 9a):

> This legislation [Section 92] authorizes national banks in towns of 5,000 inhabitants or less to act as agents for life insurance companies; in appellant's view its language carries a clear implication that national banks in larger towns have no authority to

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[4]Section 92 authorizes national banks to operate as agents for life insurance companies in towns having less than 5,000 inhabitants. As the court of appeals noted, "[b]y its own terms, the statute does not address the authority of national banks in larger towns or cities to act as agents for life insurance companies" (Pet. App. 9a n.18).

By error, Section 92 has been omitted from the United States Code. See *Commissioner of Internal Revenue* v. *First Security Bank of Utah, N.A.*, 405 U.S. 394, 401 n.12 (1972); *First National Bank of Lamarque* v. *Smith*, *supra*, 610 F. 2d at 1261-1262 n.6.

> so perform. Unlike other forms of insurance coverage, however, credit life insurance is a limited special type of coverage written to protect loans. In no way does it involve the operations of a general life insurance business whether written in a town of over or under 5,000 inhabitants. Moreover, Congress has specifically granted national banks all incidental powers necessary to carry on the business of banking, 12 U.S.C. 24, and as the record thoroughly establishes credit life insurance is now commonplace and essential where ordinary loans on personal security are involved.

The Comptroller also pointed out in his statement of basis and purpose (42 Fed. Reg. 48518 (1977)) that:

> [i]n the field of consumer credit, credit life insurance is probably the preeminent form of security taken by financial institutions today. Since the use of credit life insurance as security is now routine in the making of loans, acting as agent for that sale is plainly incidental to the power of national banks to loan money on personal security. Hence, national banks in towns of more than 5,000 that act as agent, either in their own right or through licensed employees, for the sale of credit life insurance are not engaged in the general insurance agency business contemplated by [Section 92]. Rather, they are lawfully making available to loan customers a highly specialized form of insurance peculiarly related to the business of banking and not generally available from insurance agencies unaffiliated with financial institutions.

Contrary to petitioner's assertion (Pet. 18), no court has held that the Comptroller lacks power to prescribe the circumstances under which national banks may provide credit life insurance in connection with loans made by the

bank. *Saxon* v. *Georgia Ass'n of Independent Insurance Agents, Inc.*, 399 F. 2d 1010, 1012 (5th Cir. 1968), concluded that national banks could not provide broad categories of automobile, home, casualty and liability insurance. *Saxon* did not hold that the Comptroller is powerless to adopt rules governing the limited credit life insurance practices of national banks.[5]

Commissioner of Internal Revenue v. *First Security Bank of Utah, N.A.*, 405 U.S. 394 (1972), is also irrelevant to the issue presented here. That case considered the federal income tax obligations of a national bank that received proceeds from the sale of credit insurance. The Court did not pass judgment on the Comptroller's authority to adopt regulations specifying that banks, rather than their employees, should receive commissions from the sale of credit insurance. In deciding the narrow tax question before it, the Court merely "assume[d] for the purposes of this decision that the Banks were

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[5]In promulgating his regulation, the Comptroller stressed the essential distinction between the insurance activities considered in *Saxon* and those involved here (42 Fed. Reg. 48518-48519) (1977)):

> In *Saxon*, the independent insurance agents sought to enjoin Citizens and Southern National Bank from * * * [operating] * * * a general insurance agency through which the bank acted as agent for the sale of property and liability insurance * * *. Since the types of insurance for which the bank acted as agent are commonly sought by the public outside the credit granting process, are a staple of the independent insurance agent and are characteristically sold by a general agency operation, it seems clear that the facts of this case are not controlling where a bank acts as agent in its own right or through a licensed employee for the sale of credit life insurance in connection with a specific loan—a type of insurance which * * * frequently serves in lieu of collateral or a guarantee and is not normally available from independent agencies.

This position is consistent with the regulations promulgated by the Comptroller following *Saxon*. See 12 C.F.R. 2.1-2.5 (1971).

prohibited from receiving insurance-related income * * *" (405 U.S. at 402).[6] As the court below correctly observed (Pet. App. 10a), the "assumption" in *First Security Bank of Utah* is not a decision on the requirements of Section 92. See also 42 Fed. Reg. 48519 (1977).[7]

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[6]The decision of the court of appeals in *First Security Bank of Utah* rested on the finding of the Tax Court that "the banks believed that it would be contrary to federal banking law to receive income resulting from their customers' purchase of credit insurance and that they have never received commissions or reinsurance premiums arising from credit insurance transactions." *First Security Bank of Utah, N.A.* v. *Commissioner of Internal Revenue*, 436 F. 2d 1192, 1196 (10th Cir. 1971). The court of appeals adopted a multi-factor analysis in reaching the conclusion that the banks did not "earn" income from their insurance activities. *Id.* at 1198. The court's comments on the scope of Section 92 (*ibid.*) were unnecessary to the resolution of the tax law question before the court. See 405 U.S. at 402 (assuming the correctness of the parties' uncontested interpretation of Section 92 in order to decide the case).

[7]No court except the court below has had occasion to consider the validity under Section 92 of a regulation permitting national banks to engage in the limited activity of providing credit life insurance incidental to extending consumer loans, and no other court has had the benefit of the Comptroller's expert views on that issue. See *Ford Motor Credit Co.* v. *Milhollin*, *supra*. Moreover, as noted above, the Comptroller's regulation does not *require* banks to receive commissions from the sale of credit life insurance. It merely offers that as one of several alternatives to a banking practice that the Comptroller has determined to be unsafe and unsound (Pet. App. 26a). Petitioner does not challenge the Comptroller's finding that the receipt of credit life insurance income by bank insiders is an unsound banking practice that can impair the safety of bank loans.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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